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IN THE

Supreme Court of the United States

October Term, 1964

No. ----

WINIFREDE RAILROAD COMPANY, a corporation,
and THE CARBON FUEL COMPANY, a corporation,

Petitioners.

vs.

LUTHER RAY RUMBAUGH.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Winifrede Railroad Company and The Carbon Fuel Company (herein sometimes called "Employers"), jointly and severally pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered March 2, 1964, in Case No. 9022, styled Luther Ray Rumbaugh, Appellant (Plaintiff Below) v. Winifrede Railroad Company, a corporation, The Carbon Fuel Company, a corporation, Local Union 14182 United Mine Workers of America, District 50

United Mine Workers of America, and United Mine Workers of America, Appellees (Defendants Below), wherein said Court reversed a judgment of the United States District Court for the Southern District of West Virginia, entered April 15, 1963, dismissing the complaint as to all defendants for lack of jurisdiction of the subject matter, together with the judgment of said Court of Appeals entered May 1, 1964, denying Employers' petition for rehearing.

A certified appendix record in said case, together with the proceedings in the Fourth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINIONS BELOW

The Fourth Circuit's original opinion and its opinion refusing rehearing appear in the Appendix hereto, at page 8a and page 25a respectively; in the certified record at page 24 and page 58 respectively; and the "corrected" opinion and the opinion refusing rehearing are reported in 331 F. 2d 530 (Adv. Op., June 22, 1964). The opinion of the District Court appears in the Appendix hereto at page 1a; in PA 38; and is reported in 213 F. Supp. 620.

JURISDICTION

The Court of Appeals' judgment reversing the judgment of the District Court was made and entered March 2, 1964 (A. 24a) and its judgment refusing a rehearing was made and entered on May 1, 1964 (A. 27a). This Court's jurisdiction is invoked under 28 U.S.C.A., Sections 1254 (1) and 2101 (c).

TERMS OF REFERENCE

"Plaintiff"—Luther Ray Rumbaugh, plaintiff in the District Court and appellant in the Circuit Court.

"Employers"—Winifrede Railroad Company, a corporation ("Railroad"), and The Carbon Fuel Company, a corporation ("Carbon"), defendants in the District Court and appellees in the Circuit Court.

"Unions"—Local Union 14182 United Mine Workers of America ("Local"), District 50 United Mine Workers of America ("District 50") and United Mine Workers of America ("UMWA"), defendants in the District Court and appellees in the Circuit Court.

"A"—Appendix to this Petition.

"R"—The Appendix Record filed in this Court.

"EA"—The Appendix to Employers' Brief in the Circuit Court.

"UA"—The Appendix to Unions' Brief in the Circuit Court.

"PA"—The Appendix to Plaintiff's Brief in the Circuit Court.

QUESTIONS PRESENTED

1. Does a discharged railroad employee, who elects to renounce any claim for reinstatement in employment, have any federal claim or cause of action under the Railway Labor Act (1) against railroad unions for discrimination alleged to have caused his discharge, and (2) against his former railroad employer for his discharge, alleged to be "unlawful," and for colluding with union to bring about his discharge?

2. Absent diversity of citizenship, does a federal district court have original subject matter jurisdiction of such action (1) against the discriminating union, and (2) against the railroad for general and punitive money damages resulting from his discharge?

3. When the complaint filed in a district court by such a discharged railroad employee for such claims further discloses on its face that plaintiff's dispute with the union and the railroad, which allegedly caused plaintiff's discharge, resulted from a disagreement between the discharged employee on the one hand and between union and railroad on the other about whether the former employee was within

the bargaining unit covered by an exhibited collective bargaining agreement made between the railroad and union, the complaint alleging plaintiff was a "non-supervisory" employee within the scope of the agreement, but admitting that railroad claimed he was a foreman and not a "non-supervisory" employee within the meaning of the term used in the contract, and determination of the merits of plaintiff's claim requires interpretation and application of the agreement, does a federal district court have original jurisdiction of the subject matter of the claim against (1) railroad, and (2) against the union? Does the National Railroad Adjustment Board have original primary jurisdiction of either or both claims?

4. Assuming the existence of a federal claim against union within the original jurisdiction of a district court, but the absence of such a federal claim against railroad; in the absence of diversity of citizenship does the court have ancillary jurisdiction of plaintiff's state claims (1) against railroad for wrongful discharge, (2) against railroad and union for conspiring to cause his discharge, and (3) against a iron carrier corporate affiliate of railroad alleged to own and control railroad and to have conspired with unions and railroad to effect plaintiff's discharge?

STATUTES INVOLVED

The statute involved is the Railway Labor Act (45 U.S.C.A. Sections 151 et seq.) and particularly portions of Sections 151, 151a, 152 and 153 thereof. The statutory provisions considered particularly pertinent are:

"§ 151. Definitions

"When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

* * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the man

ner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

"§ 151a. General Purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly

settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions: hearings and awards

"First. There is established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

A. The Action

Plaintiff instituted an action in the United States District Court for the Southern District of West Virginia against Winifrede Railroad Company, a corporation, Carbon Fuel Company, a corporation, Local Union 14182 United Mine Workers of America, District 50 United Mine Workers of America and United Mine Workers of America.

The action was to recover general and punitive money damages resulting from Plaintiff's discharge by Railroad

in the amount of $300,000. Plaintiff expressly renounced any claim to reinstatement in his employment.

B. Jurisdiction in the District Court

There was no diversity of citizenship. Jurisdiction was based on the Railway Labor Act and 28 U.S.C.A. Sections 1331 and 1337 (PA 26).[1] The existence of subject matter jurisdiction in the District Court is the sole question in controversy.

C. The Complaint

Except for material omissions hereinafter noted, and the fact that the complaint seeks damages only for Plaintiff's discharge (PA 32), the opinion of the Court of Appeals, as corrected after consideration of the petitions for rehearing, summarizes Plaintiff's prolix complaint with substantial accuracy under the heading "The Complaint" (A. 8a-23a), as follows:

> **"The Complaint**
>
> "Essentially, Rumbaugh's grievance against the union is that it, as the local bargaining representative, discriminated against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge through false charges filed with his employer. His complaint against the railroad arises from allegedly false representations made to him by company officials that he was not covered by the collective bargaining agreement and his subsequent summary discharge, which he asserts was unlawful. He further charges that there was collusion between the union and his employer to effect his dismissal.
>
> "As factual support for the claims of unfair representation, wrongful discharge and conspiracy, the com-

[1] The complaint also asserted jurisdiction under "The Taft Hartley Act (29 U.S.C.A. Sec. 141-168) and 29 U.S.C.A. Sec. 101-115, and Interstate Commerce Act, 49 U.S.C.A. Sec. 1 et seq" but these assertions were abandoned in argument and were ignored by the District Court and the Court of Appeals.

plaint states that the plaintiff went to work for the railroad in 1928 as a laborer and by 1959 had risen to the position of senior mechanic. Although designated as a foreman, Rumbaugh maintains that his duty was merely to verify locomotive inspection reports, and this entailed no supervisory functions whatsoever. Even though not a member of Local 14182 United Mine Workers, the plaintiff asserts that he has been unlawfully discriminated against by the bargaining agent in rejecting all of his applications for membership, while accepting similar requests from his fellow workers. He insists that the collective bargaining agreement adopted on November 7, 1958, imposed a duty on the union to represent him fairly as one of the specified 'non supervisory men.'

"From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague. Thinking the assignment unfair, the plaintiff was moved to inquire of *company agents** about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was 'briskly informed' by the agents that no such right existed and displeased as well with changes being effected in rates of pay and work rules, Rumbaugh approached the president of Winifredo Railroad and was assured that a full investigation of the matter would be made and, if necessary, a complete hearing arranged. Neither step was ever taken. This prompted the plaintiff to inquire further of a union agent on October 14, 1959, as to the union's compliance with the statutory requirement that union-management contracts and pertinent work rules be filed with the National Mediation Board. Thereafter, on the same day, it is alleged that a union agent, conspiring with other union agents and

an officer of the railroad, filed with the employer 'charges against complainant on the false ground that he [Rumbaugh] was discriminating against the union' and requested that he be fired. The next day, October 15, 1959, Rumbaugh was summarily dismissed without explanation.

"This suit for compensatory and punitive damages totalling $300,000 was instituted to redress the claimed discriminatory, wrongful and collusive behavior of the defendants."

Material Omissions in Fourth Circuit's Summary of Complaint

The material omissions of the Court of Appeals in summarizing the allegations of the complaint are:

1. The complaint, while asserting that Plaintiff was not a supervisory employee (PA 27, 28) and that "there has been no legal determination that complainant is a supervisor" (PA 28), admits that Plaintiff had a title as "foreman" (PA 28) and that Railroad claimed he was a "supervisor" and thus not covered by the collective bargaining agreement (PA 30, 32). The collective bargaining contract, exhibited with the complaint, (EA 29) covered only "non-supervisory" employees.

2. The complaint asserts that "there was no administrative remedy available to him as the Railroad did discharge him prior to the settlement of his dispute contrary to the agreements . . . and . . . did . . . advise complainant that he had no rights under the agreements as he was a supervisory employee." (PA 30).

3. The complaint alleges that Carbon, a corporation "owned" Railroad, a corporation. It does not allege that Carbon is a carrier subject to the Railway Labor Act, but

*NOTE. In the Fourth Circuit's original uncorrected opinion, the words "a union agent" appeared here (A 10a). Other corrections are not material.

asserts Carbon is jointly liable with the other defendants because it conspired with them to effect Plaintiff's "unlawful" discharge. The Court of Appeals ignored the presence of Carbon in the case.

4. The complaint expressly renounces any claim of Plaintiff for reinstatement in his employment. (PA 30)

D. The Judgments Below

The District Court, on motions by Employers (EA 27) and Unions,[2] by order entered April 15, 1963 (A 6a) dismissed the action as to all defendants for lack of jurisdiction of the subject matter, the Court being of opinion that absent diversity of citizenship, exclusive primary jurisdiction was in the National Railroad Adjustment Board (A 1a, 213 F. Supp. 620).

On appeal by Plaintiff, the United States Court of Appeals for the Fourth Circuit, by judgment entered on March 2, 1964 (A 24a) reversed the District Court and remanded the case to the District Court for further proceedings consistent with its opinion (A 8a, 331 F. 2d 530). The Court of Appeals was of opinion that federal court jurisdiction of the subject matter of Plaintiff's claim of discrimination against Unions existed if Plaintiff was a "non-supervisory employee," and thus within the class of employees Unions had undertaken to represent and for whose benefit the collective bargaining agreement exhibited with the complaint was made (A 12a); and that the District Court should hear evidence on Plaintiff's status as a "non-supervisory" employee as that term should be interpreted and applied under the collective bargaining agreement and retain jurisdiction if it found Plaintiff was not a supervisor, but entertain a motion to dismiss if it found Plaintiff was a supervisor (A. 20a). The Court of Appeals was of opinion that

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[2]Employers and Unions also moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. Unions also filed motions attacking venue and service of process. The District Court passed only on the question of jurisdiction.

pronouncements of the Supreme Court "made it clear" that the National Railroad Adjustment Board does not have exclusive "or even concurrent" jurisdiction when a railroad employee seeks redress for union discrimination, irrespective of whether the discrimination is based on race, irrespective of the fact that interpretation and application of the collective bargaining agreement controls the disposition of the dispute and irrespective of the fact that the employee's dispute is with the railroad as well as the union and the dispute with each will be controlled by interpretation and application of the collective bargaining agreement. (A 16a et seq).

The Court of Appeals was of opinion that if there was federal court jurisdiction of the discrimination claim against Unions, there was jurisdiction of the claim against Railroad because it would be "absurd to require this closely integrated dispute to be cut up into segments." (A 17a).

The Court was further of opinion that Plaintiff's claim against Railroad for wrongful discharge and against Railroad and Unions for conspiracy, although they were common law or state claims and there was no diversity of citizenship, were within the jurisdiction of the District Court under the doctrine of pendent jurisdiction (A 22a, 23a).

REASONS FOR GRANTING THE WRIT

1. *This case presents important and fundamental questions of interpretation of the Railway Labor Act and of the scope of federal administrative and judicial power in its administration, which merit determination by this Court.*

The Fourth Circuit concludes that Plaintiff, a *discharged railroad employee who expressly renounced any claim to reinstatement in his employment*, has a *federal* cause of action solely for general and punitive money damages against Unions for discrimination and, that a federal court has "ancillary jurisdiction" of his claims against Railroad and Carbon, if the District Court finds, after remand, by interpretation and application of the collective bargaining agree-

ment between Railroad and Unions, that Plaintiff was a "non-supervisory" employee within the meaning of that term used in the agreement and was therefore, in the collective bargaining unit to whose members Unions owed a duty of representation. (A 20a)

Since *Moore* v. *Illinois Cent. R. Co.*, 312 U.S. 630, the pronouncements of this Court uniformly have been that a discharged railway employee could: (1) seek to retain his employment status and obtain a money award for back pay before the National Railroad Adjustment Board, if the dispute was one within the jurisdiction of the Board, *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601; (2) seek to retain his employment status and obtain a money award in a federal court if the Adjustment Board lacked jurisdiction of the dispute, *Brotherhood of Ry. Trainmen* v. *Howard*, 343 U.S. 768; or (3) treat his discharge as final and bring a court action for wrongful discharge *if applicable state law affords a remedy. Trans-continental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653. Where the discharged employee treats his discharge as final, there is jurisdiction of the damage action against railroad in a federal court only if diversity of citizenship exists. *Transcontinental & Western Air, Inc.* v. *Koppal*, supra, *Slocum* v. *Delaware, L. & W.R. Co.*, 339 U.S. 239.

So far as can be ascertained, this Court has never intimated, much less held, that a discharged railroad employee *who renounces any claim to or interest in reinstatement in employment*, has a federal right of action under the Railway Labor Act against his former employer, or even against a union, by reason of his discharge.

The holding of the Fourth Circuit has the effect of creating a new remedy under the Railway Labor Act for discharged railroad employees who elect to renounce any claim to reinstatement in employment, a federal right of action for damages against unions, and possibly railroads, for discriminatory discharge which will be productive of mass

litigation in federal courts; litigation which Congress never intended and which no fair reading of the Act warrants.

II. *The Fourth Circuit, in holding that the Railway Labor Act gives a discharged employee, who expressly renounces any claim to reinstatement in employment, a federal right of action for money damages against a railroad union for discrimination connected with his discharge, to which claims against railroad for unlawful discharge and conspiracy with union may be joined, interprets incorrectly prior decisions of this Court.*

The Fourth Circuit, reading *Steele* v. *Louisville & Nashville R. R.*, 323 U.S. 192, and succeeding cases involving union discrimination,[3] to establish a federal right of action in Plaintiff against Unions, if his claim were based on racial discrimination, and concluding that "invidious discrimination" even though not based on race is inhibited by the Act,[4] concluded that a federal court, absent diversity, had jurisdiction of the subject matter of Plaintiff's damage actions against Unions for causing his discharge from employment, and against Railroad for discharging him, if after interpretation of the collective bargaining agreement the District Court concluded Plaintiff was a "non-supervisory employee" within the scope of the agreement (A 20a), notwithstanding plaintiff's express election to treat his discharge as final and to abandon any claim to reinstatement in employment.

The Fourth Circuit misread *Steele* and later cases because it did not apprehend the significance of the fact that in all of those cases this Court was considering claims of railroad "*employees*" who were seeking to preserve their employment status and rights under the Act. In none of

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[3]Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768; Conley v. Gibson, 355 U.S. 41.

[4]Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4 Cir. 1963), overruling Alabaugh v. Baltimore & O. R. R., 222 F. 2d 861 (4 Cir. 1955, cert. den. 350 U.S. 839).

those cases did the Supreme Court have before it actions solely for money damages of *discharged employees who had renounced their claims to reinstatement in employment.* The reliance by the Fourth Circuit on the decision by the Second Circuit in *Cunningham* v. *Erie R. R.*, 266 F. 2d 411 (2d Cir. 1959) is also unwarranted for the same reason that *Steele* and its successor cases are inapposite. In *Cunningham*, the Court found that plaintiff *was seeking reinstatement* in his railroad employment (226 F. 2d 416) and that since he was questioning the *validity* of the collective bargaining agreement rather than the *interpretation or application* of the agreement, and since his real dispute was with union and not railroad, the Adjustment Board lacked jurisdiction. Although the complaint in the instant case expressly elects to make no claim for reinstatement in employment and to sue only for damages (PA 30) the Fourth Circuit did not consider this fact significant enough to include in its summary of the complaint.

III. *If the Fourth Circuit concluded that there was federal claim jurisdiction in the United States District Court of Plaintiff's action against Railroad, it conflicts with the rationale of prior decisions of this Court.*

The observation of the Fourth Circuit that "federal jurisdiction was not deemed destroyed by joinder of railroads in actions for discrimination in cases such as *Steele, Howard* and *Graham*" (A 17a) is inapposite because in each of those cases the Supreme Court had before it cases of railroad *employees* who were seeking to protect and retain employment status, not former employees who had elected to treat their discharge as final and sue a railroad and union for money damages. It should be further observed that in *Steele, Howard* and *Graham*[1] the Court was considering disputes which, unlike the instant case, were not properly determinable by application and interpreta-

[1] Steele v. Louisville & Nashville R. R., 323 U.S. 192; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232.

tion of collective bargaining agreements and which, also unlike the instant case, involved the employer only incidentally, joined because reinstatement in employment was sought.

As Justice Black succinctly stated in *Howard*:

> "This case raises questions concerning power of courts to protect Negro railroad employees *from loss of their jobs* under compulsion of a bargaining agreement which, to avoid a strike, the railroad made . . . [343 U.S. 769]
>
> • • •
>
> "*The claims here can not be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum* v. *Delaware L & W R. Co.* [*339 U.S. 239*]." (Emphasis supplied.)

Neither *Steele*, *Howard* nor *Graham* are authority for the proposition that there is federal jurisdiction under the Railway Labor Act of a court action of a *discharged railroad employee who expressly elects to renounce any claim to reinstatement in employment* and seeks solely to recover money damages jointly from his former employer and unions for his discharge. *Cunningham* v. *Erie R. R.*, 266 F. 2d 411, 416 (2d Cir. 1959), was also a claim of an *employee* seeking reinstatement.

It is submitted that the fundamental rationale of the *Moore doctrine*,* is that a discharged railroad employee who elects not to seek reinstatement in employment ceases to be an "employee" within the Act's definition of that term (45 U.S.C.A. § 151 Fifth) and no longer has rights or remedies under the Act by reason of his discharge, at least against his former employer. *Slocum* v. *Delaware, L. & W.*

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*Moore v. Illinois Cent. R. Co., 312 U.S. 630; Slocum v. Delaware L & W R. Co., 339 U.S. 239; Transcontinental & Western Air, Inc. v Koppal, 345 U.S. 653. See also the dissent of Justice Black in Pennsylvania R. Co. v. Day, 360 U.S. 548, 554, 555, and the majority opinion of Justice Frankfurter, 360 U.S. 548, 553, 554.

R. Co., 339 US 239, 244. Justice Black, the author of *Slocum*, recently observed that the Railway Labor Act "is to govern active workers only" and that a worker who relinquishes "all rights to return to railroad service in the future" is not an "employee" within the meaning of the Act. *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 555.

The history of the Act[7] indicates most clearly an intention on the part of the Congress to provide compulsory arbitration, rather than litigation, of all disputes between a carrier and an employee "growing out of grievances or out of the interpretation or application of" collective bargaining agreements. (45 U.S.C.A. § 153 First (i)); and the remedy of an employee in a dispute vis a vis a carrier under the Railway Labor Act is to "reinstatement and back pay," *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548, 552. "*The specification of one remedy normally excludes another.*" *Switchmen's Union of N. A.* v. *National Mediation Board*, 320 U.S. 297, 301; *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601, 608.

IV. *The Fourth Circuit failed to articulate with reasonable clarity the rationale of its conclusion that the District Court had jurisdiction of the claims against Railroad, and presumably Carbon.*

The Fourth Circuit at the outset of its opinion stated the jurisdictional questions as follows (A 9a):

> "• • • Since there is no diversity of citizenship between the parties, federal jurisdiction must be predicated upon a claim arising under the laws of the United States. 28 U.S.C.A. §§ 1331, 1337. No such federal question was recognized by the District Court for the Southern District of West Virginia and the complaint was dismissed for lack of jurisdiction over the subject

[7] See e.g., Brotherhood of R. Trainmen v. Chicago River & I. R. Co., 353 US 30, 1 L ed 2d 622, 77 S Ct 635; Slocum v. Delaware, L. & W. Co., 339 US 239, 94 L ed 795, 70 S Ct 577; Order of R. Conductors v. Pitney, 326 US 561, 90 L ed 318, 66 S Ct 322; Elgin, J. & E. R. Co. v. Burley, 325 US 711, 89 L ed 1886, 65 S Ct 1283.

matter, the District Court holding that exclusive jurisdiction was in the Railroad Adjustment Board.

"This disposition of plaintiff's claims raises two fundamental jurisdictional questions. First, is there federal court jurisdiction over an *employee's* suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit which the union is statutorily obligated to represent? Second, does an *employee* have such a federal claim against his employer for wrongful discharge that jurisdiction will lie in a federal court regardless of citizenship of the parties." (Emphasis supplied. The Court misused the term.)

The Fourth Circuit answered the second question in the negative "unless the judicially created doctrine of 'pendent jurisdiction' may be invoked." (A 21a) And in its per curium opinion refusing rehearing, the Court said: "We concluded that there was original jurisdiction of the claim for breach of the duty of fair representation and, further that there was ancillary jurisdiction of the remaining claims." (A 26a)

Employers concede this construction of the Fourth Circuit's opinion appears inconsistent with its conclusions that the District Court had pendent jurisdiction of the state common law claims against Railroad and Carbon for wrongful discharge and conspiracy, because the Fourth Circuit admits pendent jurisdiction can be properly invoked only because "Both the federal and the nonfederal claims are asserted by the same plaintiff against the same defendants." (A 22a). The holding of the Court of Appeals is further confused by the Court's discussion of "ancillary jurisdiction" in the context of *Cunningham* v. *Erie R. R.*, supra, and Rule 20(a) of the Federal Rules of Civil Procedure (A 17a, 18a). The citation of Rule 20 (a) in *Conley* v. *Gibson*, 355 U.S. 41, was not inappropriate in that case because the "employees" there had not elected to renounce their federal right to reinstatement in employment.

Here the plaintiff, having elected to treat his discharge as final, has no federal claim against Railroad and Carbon, and Rule 82 of the Rules of Civil Procedure provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

The doctrine of ancillary jurisdiction may have been applicable to retain the railroad as a party in *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir. 1959) because the Court had before it a claim of a railroad "employee" who sought reinstatement in employment, but this Plaintiff has elected to abandon such a claim.

V. *The Fourth Circuit erroneously applied the doctrine of "pendent jurisdiction."*

The Fourth Circuit itself admits that the doctrine of pendent jurisdiction applies only when "Both the federal and non federal claims are asserted by the same plaintiff against the same defendants." (A 22a)

Although there is disagreement in many courts in applying the single cause of action test of *Hurn* v. *Oursler*, 289 U.S. 238, there is general consensus "that pendent jurisdiction is not to be employed as a device for bringing in parties not necessary for determination of the federal question."[*] Since Plaintiff has no federal claim against Railroad or Carbon, and their presence is not required to determine the federal question or to grant the relief which plaintiff seeks, no basis for pendent jurisdiction exists.

Nor can it be fairly said that there is one "cause of action" here or that "substantially the same state of facts"

[*]Note. The Evaluation and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Columbia Law Review 1018, 1027.

will dispose of the federal claims of union discrimination, and the state claims of breach of contract and conspiracy.*

VI. *If Plaintiff has a federal claim under the Railway Labor Act, it is one subject to the original primary jurisdiction of the National Railroad Adjustment Board.*

If Plaintiff had not elected to renounce his claim to reinstatement in employment, or if the Fourth Circuit is correct in its apparent conclusion that his election did not materially affect his rights under the Railway Labor Act, the dispute here is one which Congress by 45 U.S.C.A. Sec. 153 First (i) has committed to the original primary jurisdiction of the National Railroad Adjustment Board.

Plaintiff claims that he was a "non-supervisory" employee and as such was within the bargaining unit for which Unions acted in making the exhibited collective bargaining agreement with Railroad, while expressly admitting in his complaint that Railroad gave him a title as "foreman" and claims that he was a supervisory employee and not within the application of the agreement which, by its terms, covered "non-supervisory" employees. The Fourth Circuit not only acknowledges that such a dispute existed, but it directed the District Court, on remand, to interpret and apply the agreement to the facts and ascertain if plaintiff was a "non-supervisory employee," and entertain a new motion to dismiss if he were a supervisor (A 20a).

The Fourth Circuit reasoned that although there was a dispute between Plaintiff and Railroad concerning the application and interpretation of the agreement, since Plain

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*Hurn v. Oursler, 289 U.S. 238; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315; French Renovating Co. v. Ray Renovating Co., 170 F. 2d 945 (6 Cir. 1948); New Orleans Pub. Belt R.R. v. Wallace, 173 F. 2d 145 (5th Cir. 1949) (Common law claim of negligence against one defendant and claim under Federal Employers Liability Act against another defendant are separate causes of action); Pearce v. Pennsylvania R.R., 162 F. 2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947) (same); *cf.* Sullivan v. United States, 120 F. Supp. 217 (N.D. Ill. 1954) (Federal Tort Claims Act); 62 Columbia Law Review 1018, Hart & Wechsler, The Federal Courts and the Federal System, 802.

tiff and Unions were in a dispute involving the same question of application and interpretation of the agreement, and Plaintiff alleged Unions "discriminated against him," "pronouncements of the Supreme Court make it clear that the Adjustment Board does not have exclusive, or even concurrent jurisdiction . . ." (A. 16a, 17a).

The Fourth Circuit's reading of *Steele* and later cases which it cites (A 16a, fn. 7) in support of its conclusion is not a sound reading. In those cases will be found some language consistent with the Fourth Circuit's conclusion, but they were all cases in which the *validity* of the agreement rather than its interpretation was the issue or cases in which there was no real dispute between the plaintiff and railroad, but only between plaintiff and union. In *Steele* the Court was careful to observe that there were no "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board." *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 205.

The Act, 45 U.S.C.A. Sec. 153, First (i), read literally speaks only of "The disputes between an employee or group of employees and a carrier or carriers . . .". But where, as here, a discharged employee is complaining about his discharge by the carrier, and the discharge is not alleged to have been required by an invalid agreement, but on the contrary, the merits of the discharged employee's dispute with the carrier and the union will be resolved by interpretation and application of the agreement, the Fourth Circuit's reading of the Act deprives the carrier of a right expressly given it by Congress, and is contrary to *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38; *Order of R. Conductors* v. *Southern R. Co.*, 339 U.S. 255, 256, 257; *Slocum* v. *Delaware, L & W. R. Co.*, 339 U.S. 239; and *Pennsylvania R. Co.* v. *Day*, 360 U.S. 548.

The Fourth Circuit's reading of the Act would deprive the Railroad Adjustment Board of jurisdiction, *at the elec*

tion of an employee, whenever a union agreed with a carrier's interpretation and application of a collective bargaining agreement and an affected employee was in disagreement, thus producing an employee-union as well as an employee-carrier dispute. All such three party disputes about the interpretation and application of collective bargaining agreements could then be taken, *at the election of the employee* to the Adjustment Board *or* to a United States District Court.

VII. *The holding of the Fourth Circuit that the National Railroad Adjustment Board lacked jurisdiction is in conflict with decisions in other circuits.*

In holding the Railroad Adjustment Board lacked jurisdiction, the Fourth Circuit is in conflict with opinions of the Third Circuit in *Roberts* v. *Lehigh & New England Ry. Co.*, 323 F. 2d 219, 222 (1963), the Fifth Circuit in *Britton* v. *Atlantic Coastline R. Co., et al.*, 303 F. 2d 274 (1962), and the Seventh Circuit in *Pickett* v. *N. Y. Central R. R. Co., et al.*, decided June 17, 1964, and reported in 56 L.R.R.M. 2520.

CONCLUSION

For the reasons assigned, Petitioners pray that their Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, entered in Case No. 9022 on March 2, 1964.

Respectfully submitted,

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July 15, 1964

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

Civil Action No. 2478

LUTHER RAY RUMBAUGH,
Plaintiff,

v.

WINIFREDE RAILROAD COMPANY, a corporation;
THE CARBON FUEL COMPANY, a corporation;
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA;
DISTRICT 50 UNITED MINE WORKERS OF AMERICA; AND
UNITED MINE WORKERS OF AMERICA,
Defendants.

Opinion

In this action the plaintiff seeks to recover damages from the defendant corporations for his alleged wrongful discharge and joins the defendant Union for its alleged discrimination against him in procuring his discharge. He alleges that this Court should take jurisdiction of the action by virtue of the provisions of the Railway Labor Act, the Taft-Hartley Act and the Interstate Commerce Act. The defendants have moved to dismiss the complaint on various grounds but it is necessary to consider only the question of this Court's jurisdiction over the subject matter of this action.

First, and of paramount importance, is the fact that this is not an action based upon diversity of citizenship. There is no allegation of diversity jurisdiction in the complaint, and on its face it is clearly evident that the requisites for such jurisdiction are lacking. This lack of diversity is important in the light of the statement in the complaint that the plaintiff has elected to treat his discharge as final and sue for damages for wrongful discharge. It is now well settled that an employee, alleging his wrongful discharge,

may, if he chooses, challenge the validity of his discharge before the Adjustment Board under the provisions of the Railway Labor Act or, in the alternative, treat such discharge as final and resort to the courts. However, if he comes into a federal court, jurisdiction necessarily rests upon diversity of citizenship and the law of the forum state is applied. *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630; *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653; see also *Hilton* v. *Norfolk and Western Railway Company*. 194 F. Supp. 915. The benefit of this exception to the primary jurisdiction of the Adjustment Board is not available to the plaintiff here by reason of the patent lack of diversity between the parties.

Plaintiff contends, however, that the alleged discriminatory participation by the defendant Union presents a state of facts that entitles him to seek redress in the federal courts, and relies strongly upon the Second Circuit decision in *Cunningham* v. *Erie Railroad Company*, 266 F. 2d 411. It is true that *Cunningham* recognized an extension of federal jurisdiction in this area which had its genesis in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, and the companion case of *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210. In considering a proposed amendment to the collective bargaining agreement which would have excluded all Negro firemen from service, the Court in *Steele* observed that the Railway Labor Act cast upon a union the duty "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." In that case the Court concluded that since the administrative remedies under the Act were not available in a dispute between employees and their representative, the grievance of the employees for breach of the statutory duty by the union was of judicial cognizance. The companion *Tunstall* case likewise involved alleged discrimination by the union against certain Negro employees, and the great majority

of the cases which followed in the wake of *Steele* v. *Louisville & Nashville* dealt with discrimination based upon race or color. In cases involving alleged discriminatory practices under circumstances other than those involving race or color, many of the courts refused to extend the scope of this exception to the primary or exclusive administrative jurisdiction of the Adjustment Board under the Act. The Fourth Circuit took this restrictive viewpoint in *Spires* v. *Southern Railway Co.*, 204 F. 2d 453, and *Alabaugh* v. *Baltimore and Ohio Railroad Co.*, 222 F. 2d 861. In the latter case, Judge Parker, in commenting upon *Steele* and *Tunstall*, stated at pages 866 and 867:

> "• • • but those cases dealt with racial discrimination, as to which the courts were well qualified to grant relief and which involved none of the matters of collective bargaining which the Adjustment Board was set up to handle.
>
> "• • • Logically it may seem that if a court has jurisdiction to protect rights against racial discrimination it should have jurisdiction to protect them against discrimination on account of union membership; but the answer is that the Adjustment Board was not set up to deal with racial controversies, but controversies arising out of labor relationships."

Admittedly, however, in cases where the crux of the controversy involves a charge of discrimination by the employee against his union representative rather than a controversy between an employee or his union vis-a-vis the railroad, the current of judicial authority in this area has trended in the direction of the *Cunningham* case. See *Latham* v. *Baltimore and Ohio Railroad Company*, 274 F. 2d 507; *Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F. 2d 604; *Nobile* v. *Woodward*, 200 F. Supp. 785.

Some indication of this acceptance of the principle of *Cunningham* has appeared in the Fourth Circuit in the Dis-

trict Court opinion in *Hostetler* v. *Brotherhood of Railroad Trainmen*, 183 F. Supp. 281, and in the dissenting opinion of Judge Bryan in the same case on appeal in 287 F. 2d 457, at page 463 where he observed:

> ". . . . A strict, constant and delicate sensibility of the bargaining representative to its trust has repeatedly been enjoined upon the union by the Supreme Court. Conley v. Gibson, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80. That the factual basis of these cases was race or color does not in the slightest dilute the unequivocal command of fairness they give the bargaining agent."

However in *Chapman* v. *Local* 104 *of International Association of Machinists*, 199 F. Supp. 186, Judge Watkins recognized the conflict between *Cunningham* and *Alabaugh* and concluded that in this Circuit the District Court was bound to follow the restrictive concept of *Alabaugh*.

In any event, however, the *Cunningham* case is of no assistance to the plaintiff here for it could have no application upon the record in this case. In *Cunningham* as well as the other cases in this area, the thrust of the plaintiff's case was directed primarily, if not exclusively, against his Union representative, and the position of the Railroad in the pattern of litigation was merely incidental by reason of the collective bargaining agreement. The Railroad is ordinarily a party in such a suit only because the plaintiff seeks a reinstatement of his employment status or restoration of certain rights thereunder. See *Latham* v. *Baltimore and Ohio Railroad Company* and *Nobile* v. *Woodward*, *supra*. The nature of the litigation is such that the Railroad was not considered an indispensable party in *Conley* v. *Gibson*, 355 U.S. 41. In the latter case the nature of the controversy as the basis for federal jurisdiction and the posture of the Railroad therein was stated as follows at page 44:

"* * * This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination. Furthermore, the contract between the Brotherhood and the Railroad will be, at most, only incidentally involved in resolving this controversy between petitioners and their bargaining agent."

The prolix and ambiguous complaint in the present case goes far afield from a mere complaint of alleged discriminatory treatment of the plaintiff by the Union representative in exercising its authority by virtue of the Act; and it would cast the defendant corporations in a position far different from that of innocent bystanders whose presence is merely incidental by reason of the collective bargaining agreement. It alleges that the defendant corporations actively conspired with the Union to bring about plaintiff's discharge, and charges that the Railroad controlled the Union in a manner that was detrimental and discriminatory toward the employees. The plaintiff does not seek a determination or restoration of his employee status, but rather asks to recover damages for his wrongful discharge. A distillation of the plaintiff's allegations indicates that they are nothing more than a complaint for an unlawful discharge from his employment or a conspiracy upon the part of the defendants to commit a common law tort against the plaintiff. Jurisdiction of these causes of action cannot be entertained by this Court in the absence of diversity of citizenship between the parties. Accordingly, the motions to dismiss will be granted.

Order and Judgment

On this the 15th day of April, 1963, again came plaintiff Luther Ray Rumbaugh, by William F. Carroll, E. Franklin Pauley and Edwin M. Young, his attorneys; defendant Winifrede Railroad Company, a corporation, by F. Paul Chambers, its attorney; The Carbon Fuel Company, a corporation, by James Knight Brown, its attorney; and also came defendant Local Union 14182, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; defendant District 50, United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; and defendant United Mine Workers of America, by M. E. Boiarsky and R. L. Theibert, its attorneys; each of said defendant unions appearing specially and not generally; and thereupon this cause came on for determination upon the bill of complaint, the respective written motions of defendant Winifrede Railroad Company and defendant The Carbon Fuel Company to dismiss the action, and the respective written motions to dismiss, to quash summons and service thereof and return of service thereon and notices of motion of defendant Local Union 14182, United Mine Workers of America, defendant District 50, United Mine Workers of America, and defendant United Mine Workers of America, respectively, together with the affidavit of Thomas Kennedy and the exhibits attached thereto and the affidavit of Edward Hunter, filed in support of said motions, all of which, if not heretofore filed, are ORDERED filed as a part of the record in this case; and the Court having heretofore heard oral arguments by said parties and having maturely considered the same, as well as written briefs filed by each of the respective parties, and being of opinion for the reasons set forth in a written opinion dated January 29, 1963, which is ORDERED filed as a part of the record herein, that there is no diversity of citizenship and that this Court is without jurisdiction over the subject matter of this action, and that each of said motions to dismiss should be sustained,

It is therefore ORDERED that each of the several motions to dismiss said complaint and action filed by the defendants herein be and the same are hereby sustained; that plaintiff take nothing by his action and complaint; that said action be dismissed and removed from the docket, and that each of the defendants recover against said plaintiff its costs. To which counsel for plaintiff excepts.

APPENDIX B

Filed March 2, 1964

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

(Argued September 27, 1963. Decided March 2, 1964.)

Before SOBELOFF, Chief Judge, BOREMAN, Circuit Judge, and NORTHROP, District Judge.

Edwin M. Young (E. Franklin Pauley on brief) for Appellant, and F. Paul Chambers (James K. Brown and Jackson, Kelly, Holt & O'Farrell on brief) for Appellees Winifrede Railroad Company and Carbon Fuel Company, and M. E. Boiarsky for Appellees Unions.

SOBELOFF, Chief Judge:

This is another in the succession of cases since *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), involving

interpretation of the Railway Labor Act, 45 U.S.C.A. § 151 *et seq.*, and determination of the scope of federal judicial power in its administration.

Rumbaugh has joined his former employer, Winifrede Railroad Company, and the union designated as the bargaining representative for local railroad employees as co-defendants in an action to recover damages allegedly caused by the independent and combined efforts of the defendants to effect his discharge. Since there is no diversity of citizenship between the parties, federal jurisdiction must be predicated upon a claim arising under the laws of the United States 28 U.S.C.A. §§ 1331, 1337. No such federal question was recognized by the District Court for the Southern District of West Virginia and the complaint was dismissed for lack of jurisdiction over the subject matter, the District Court holding that exclusive jurisdiction was in the Railroad Adjustment Board.

This disposition of plaintiff's claims raises two fundamental jurisdictional questions. First, is there federal court jurisdiction over an employee's suit against a union for invidious discrimination where there is a dispute as to whether the aggrieved worker is a member of the bargaining unit which the union is statutorily obligated to represent? Second, does an employee have such a federal claim against his employer for wrongful discharge that jurisdiction will lie in a federal court regardless of the citizenship of the parties?[1]

THE COMPLAINT

Essentially, Rumbaugh's grievance against the union is that it, as the local bargaining representative, discriminated

[1] An affirmative answer to either question could well enable plaintiff to resort to a federal forum since, under the doctrine of pendent jurisdiction, a federal court's jurisdiction based on a federal claim extends to any nonfederal claim in the case if the claims constitute a single cause of action. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L.Rev. 1018 (1962); *cf. United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F.2d 52, 59-60 (6th Cir.), *cert. denied* 359 U.S. 1013 (1959).

against him by refusing him membership, by failing to protect his employment rights, and by wrongfully procuring his discharge through false charges filed with his employer. His complaint against the railroad arises from allegedly false representations made to him by company officials that he was not covered by the collective bargaining agreement and his subsequent summary discharge, which he asserts was unlawful. He further charges that there was collusion between the union and his employer to effect his dismissal.

As factual support for the claims of unfair representation, wrongful discharge and conspiracy, the complaint states that the plaintiff went to work for the railroad in 1928 as a laborer and by 1959 had risen to the position of senior mechanic. Although designated as a foreman, Rumbaugh maintains that his duty was merely to verify locomotive inspection reports, and this entailed no supervisory functions whatsoever. Even though not a member of Local 14182 United Mine Workers, the plaintiff asserts that he has been unlawfully discriminated against by the bargaining agent in rejecting all of his applications for membership, while accepting similar requests from his fellow workers. He insists that the collective bargaining agreement adopted on November 7, 1958, imposed a duty on the union to represent him fairly as one of the specified "non-supervisory men."

From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague. Thinking the assignment unfair, the plaintiff was moved to inquire of a union agent about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was "briskly informed" by the agent that no such right existed and displeased as well with changes being

effected in rates of pay and work rules, Rumbaugh approached the president of Winifrede Railroad and was assured that a full investigation of the matter would be made and, if necessary, a complete hearing arranged. Neither step was ever taken. This prompted the plaintiff to inquire further of the union agent on October 14, 1959, as to the union's compliance with the statutory requirement that union-management contracts and pertinent work rules be filed with the National Mediation Board. Thereafter, on the same day, it is alleged that a union agent, conspiring with other union agents and an officer of the railroad, filed with the employer "charges against complainant on the false ground that he [Rumbaugh] was discriminating against the union" and requested that he be fired. The next day, October 15, 1959, Rumbaugh was summarily dismissed without explanation.

This suit for compensatory and punitive damages totalling $300,000 was instituted to redress the claimed discriminatory, wrongful and collusive behavior of the defendants.

CLAIM AGAINST THE UNION

Duty of Fair Representation

Since the landmark case of *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the principle has become unchallengeable that the federal courts have subject-matter jurisdiction to enforce the judicially-created duty imposed upon bargaining agents to represent all employees in the bargaining unit fairly and without racial discrimination.[2] Originally this court in *Alabaugh* v. *Baltimore & O. R.R.*, 222 F.2d 861 (4th Cir.), *cert. denied*, 350 U.S. 839 (1955), adopted the view that federal jurisdiction over alleged violations of the "duty of fair representation" was re-

[2]See also *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *cf. Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955).

stricted to cases of racial discrimination. The District Court, following this guide, declined to give weight to what it recognized to be "the current of judicial authority" toward expansion of the union's obligation to include all forms of hostile treatment and discrimination regardless of race.[3]

While the District Court's conclusion, when rendered, was consistent with the position theretofore taken by this court, it does not reflect the broader principle which we subsequently announced in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963). There we specifically stated that *Alabaugh* "represents too narrow a view" and that the judicially enforceable duty of fair representation "should be interpreted as also prohibiting invidious discrimination that is not based upon race." *Id.* at 198. Thus we held that an allegation of breach of the statutory duty, even if not based upon racial discrimination, is within the jurisdiction of the federal courts.

Membership in the Bargaining Unit

We also recognized in *Thompson* that no less protection should be afforded to an aggrieved non-union member who is within the bargaining unit for which the union is the bargaining agent than is afforded to a member of the union.[4] Because the duty extends only to those employees whom the union is empowered to represent and because a union cannot be expected to look after the needs and demands of workers who are not covered by the collective bargaining agreement, an employee must establish, as part of his case, that he is a member of the designated bargaining unit.

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[3] See *Humphrey* v. *Moore*, 32 U.S.L.W. 4055, 4057 (January 7, 1964); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 198 n.15 (4th Cir. 1963); Blumrosen, "The Worker and Three Phases of Unionism," 61 Mich. L. Rev. 1435, 1470 (1963).

[4] See also *Conley* v. *Gibson*, 355 U.S. 41, 42 (1957); *Syres* v. *Oil Workers Int'l Union*, 350 U.S. 892, *affirming* 223 F.2d 739, 742-43 (5th Cir. 1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337 (1953); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 255 (1944); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 197 (4th Cir. 1963); *Hostetler* v. *Brotherhood of Railroad Trainmen*, 287 F.2d 457, 458 (4th Cir. 1961).

Rumbaugh maintains that the union's duty of fair representation extends even further. His theory is that when discrimination is alleged, the complainant's status relative to the bargaining unit is immaterial. As support for this contention he cites *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). But in that case the Supreme Court rejected the proposition that *Steele's* prohibition against racial discrimination was inapplicable because the plaintiffs, train porters, were not designated as brakemen, the class of employees represented by the Brotherhood. The Court said that the central issue was the legality of the collective bargaining agreement which the white union had secured and which had the effect of requiring the carrier to eliminate all Negro train porters and substitute white brakemen in their places.

We agree that the Court disregarded the artificial classification of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification. The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as "employees" within the meaning of the Railway Labor Act.

The union's position is that Rumbaugh is not within the unit it represents, because he is a supervisor. It contends that exclusive jurisdiction to determine his employment classification (*i.e.*, whether he is a supervisor or a non-supervisor) lies either with the National Railroad Adjustment Board as a question arising "out of the interpretation or application of agreements," 45 U.S.C.A. § 153 First (i), or with the National Mediation Board as a dispute concerning craft classification or representation, 45 U.S.C.A. § 152 Ninth.

Rumbaugh's rejoinder is that the complaint, the well-pleaded facts of which are to be taken as true for purposes of the motion to dismiss, establishes his non-supervisory status when it avers that:

> "He was an hourly paid employee with no authority to hire, fire or discipline; he kept records on other employees of a clerical nature but with no supervisory function over them. He was given a title as foreman by the company for the purpose of signing locomotive inspection reports."

Rumbaugh makes the point that the District Court should at least have heard evidence on the issue of his employment status before concluding that the allegations of the complaint are insufficient to establish federal jurisdiction.

The general principle that pleadings are to be liberally construed was applied in *Priest* v. *Chicago, R.I. & P. R.R.*, 189 F.2d 812 (8th Cir. 1951), a case strikingly similar to the one at hand. There a discharged railroad metal worker brought suit against his former employer, alleging *inter alia*, that the carrier and the union had discriminated against him by disregarding his superior seniority rights and effecting his discharge because of his membership in another union. The plaintiff prayed for monetary damages, reinstatement and an injunction. The defendant answered that exclusive jurisdiction lay in the National Railroad Adjustment Board because the dispute was between an employee and a carrier growing out of the interpretation or application of a collective agreement. The District Court adopted the union's view without holding a hearing and granted its motion to dismiss for lack of jurisdiction. The Court of Appeals reversed.

> "It seems probable that when this case is tried the evidence will show that the plaintiff was never discharged, but was, as the defendant asserts, merely laid off or furloughed, due to a reduction of force, and

that the controversy involves only the interpretation and application of the collective bargaining agreement referred to in the complaint." *Id.* at 815.

In spite of this the court found itself unable to say "to a legal certainty" that there was no jurisdiction and therefore held that "the District Court should not have attempted to decide the question of its jurisdiction from allegations of the complaint and of the motion to dismiss, but should have taken evidence to show the exact factual basis for the plaintiff's claim before ruling upon the question of jurisdiction."

Postponement of the final resolution of the jurisdictional problem until the District Court has had an opportunity to sound the complaint for its underlying factual and legal bases, as was done in *Priest* and other cases,[4] was required in the present action unless it were clear from the pleadings that, in so doing, the federal court would usurp the statutory power of the administrative agencies created by the Railway Labor Act. In this regard the union calls attention to the specific wording of the Act and to court decisions which, it says, indicate that exclusive competency is with either the National Railroad Adjustment Board or the National Mediation Board rather than with the federal courts to determine whether a discharged railroad employee was, prior to his release, a member of the bargaining unit which the union was duty-bound to represent. We disagree with the union's interpretation for the reasons now to be stated.

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[3] Ours is not a case where the complaint presents only conclusions of fact unsupported by allegations of specific facts upon which the conclusions rest such that the facts cannot be regarded as well pleaded. See *Homan Mfg. Co.* v. *Russo*, 233 F.2d 547, 550 (7th Cir. 1956); *Rishel* v. *Pacific Mut. Life Ins. Co.*, 78 F.2d 881, 886 (10th Cir. 1935).

Nor is it a case of legal conclusions cast in the form of factual allegations. See *Pauling* v. *McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960).

[4] See *Brotherhood of Railroad Trainmen* v. *Central of G. Ry.*, 305 F.2d 605 (5th Cir. 1962); *Koelker* v. *Baltimore & O. R.R.*, 140 F. Supp. 887, 890 (E.D. Pa. 1956); *Hawn* v. *American S.S. Co.*, 26 F. Supp. 428 (W.D.N.Y. 1939) (evidence of plaintiff's status as a "seaman").

Employee-Union Disputes Not for the Railroad Adjustment Board

Section 153 First(i) of 45 U.S.C.A. provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, • • • may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board • • •."

The plain meaning of this section is that the Board is charged with the responsibility of adjudicating controversies between employees and their employer, the carrier, and not those involving employees and their bargaining representative. This interpretation has been reiterated many times since the Supreme Court's landmark decision in *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944), where this section was interpreted as follows:

> "Section 3, First (i) [45 U.S.C.A. § 153 First (i)], which provides for reference to the Adjustment Board of 'disputes between an employee or group or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements,' makes no reference to disputes between employees and their representative." *Id.* at 205.

Later cases have followed this reading of the statute.[1]

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[1] *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 213 (1944); *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 239 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Order of Railway Conductors* v. *Southern Railway*, 339 U.S. 255 (1950); see *Pennsylvania R.R.* v. *Day*, 360 U.S. 548, 550 (1959); *Haley* v. *Childers*, 314 F.2d 610, 615-17 (8th Cir. 1963); *Gainey* v. *Brotherhood of Ry. & S.S. Clerks*, 275 F.2d 342, 344 (3d Cir. 1960); cf. *Pelter* v. *Southern Pac. Co.*, 359 U.S. 326, 327 n.3 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963); *Britton* v. *Atlantic C. L. R.R.*, 303 F.2d 274 (5th Cir. 1962); *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961).

The union, however, asserts that two Supreme Court decisions cast doubt on the above-stated rule. But we think that the Court in these

(Footnote continued on next page)

These pronouncements of the Supreme Court make it clear that the Adjustment Board does not have exclusive, or even concurrent, jurisdiction over suits by an employee against the bargaining agent to redress discriminatory treatment.

Nor do we find that the joinder of the railroad as a defendant in this claim changes the situation. In the first place, federal jurisdiction was not deemed destroyed by joinder of railroads in actions for discrimination in cases such as *Steele*, *Howard* and *Graham*. And in *Cunningham* v. *Erie R.R.*, 266 F.2d 411 (2d Cir. 1959), a suit for discrimination brought by a former employee against the union and the employer, the court said at page 416:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it also has power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."

There the employee's grievance, asserted against both the union and the railroad, was that he was "discriminatorily

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cases took great pains to reaffirm *Steele* and its interpretation of the statute. In the first, *Slocum* v. *Delaware, L. & W. RR.*, 339 U.S. 239 (1950), the Court held that a dispute between two unions concerning the scope of their respective agreements could not be resolved in a state court on a motion by the railroad for a declaratory judgment because such controversies are within the exclusive competency of the Adjustment Board, the agency authorized to settle "railroad-employee disputes growing out of the interpretation of existing agreements." *Id.* at 243. But in an accompanying footnote, id. at 244 n.7, the Court emphasized that "[W]e are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative as in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192."

In a second case, *Conley* v. *Gibson*, 355 U.S. 41 (1957), it was stated that:

> "This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. [footnote omitted] The Adjustment Board has no power under § 3 First(i) or any provision of the Act to protect them from such discrimination."

Specific reference to the jurisdictional distinction between employee-employer suits and employee-bargaining agent actions was again made, the Court stating in footnote 4, page 44, "[f]or this reason the decision in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, is not applicable here."

discharged." The court held that the presence of the railroad as a party defendant did not defeat federal court jurisdiction because exclusive Adjustment Board jurisdiction extends only to employee-employer disputes and since the railroad was "brought in only because it claimed it was required by law to discharge persons who had been removed as members of the union for non-payment of dues," the controversy was essentially between the employee and the union, with the railroad only incidentally involved. We think the principle applicable in the present case. Rumbaugh has joined the railroad to his discrimination charge only because he is claiming that, in consequence of its active participation in the union's discriminatory conduct, he was unlawfully discharged. For this reason the *Cunningham* holding is apposite.[2]

Furthermore, *Cunningham* is in accordance with the salutary principles of avoiding a multiplicity of suits and expediting the final determination of litigation which are the foundation of Rule 20(a), Fed. R. Civ. P. Because a railroad is not an indispensable party to an employee's action against the union for invidious discrimination, as the Supreme Court held in *Conley* v. *Gibson*, 355 U.S. 41 (1950), the joinder is permissive and is governed by the following standard:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action . . ." Rule 20(a), Fed. R. Civ. P.

Under this rule joinder of parties-defendant is governed by the concepts of "same transaction" and "common

[2] Later in this opinion we deal with the separate claim against the railroad for wrongful discharge.

question of law or fact.'" The allegations here satisfy these requirements.

Judicial Interpretation of the Collective Agreement Is Not Forbidden

Though resolution of the issue whether or not Rumbaugh is a supervisor may require an interpretation of the collective bargaining agreement, the federal courts are not ousted from their function merely because, under certain circumstances, interpretation is delegated to the Board. Here, as we have shown, the Board lacks jurisdiction. This being so, and the cause of action for invidious discrimination being cognizable by the federal courts, they have the power—and the duty—to interpret the agreement. Otherwise there would be no forum, judicial or administrative, competent to grant relief.

Jurisdiction of the National Mediation Board

We also find that the National Mediation Board is without jurisdiction over this case. The Railway Labor Act, 45 U.S.C.A. § 152 Ninth, provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees * * * it shall be the duty of the Mediation Board, upon request of either party to the dispute,

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[1] See generally 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 533 (1961); 3 MOORE, FEDERAL PRACTICE par. 20.06 (1948); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926) ("'Transaction' [as used in Rule 20(a)] is a word of flexible meaning. It may comprehend a series of many occurrences * * *.")

[2] See *Heisler* v. *Parsons*, 312 F.2d 172, 176 (7th Cir. 1962); cf. *Virginian Ry* v. *System Fed'n No. 40*, 300 U.S. 515 (1937); *Brotherhood of Locomotive Firemen* v. *Northern Pac. Ry.*, 274 F.2d 641 (8th Cir. 1960); *Switchmen's Union* v. *Southern Pac. Co.*, 253 F.2d 81 (9th Cir. 1957); *Brotherhood of Ry. & S.S. Clerks* v. *Atlantic C. L. R.R.*, 201 F.2d 36 (4th Cir. 1953).

The fact that interpretation of collective agreements was involved has not in the past prevented courts from retaining jurisdiction of actions to enforce the duty of fair representation. *Conley* v. *Gibson*, 355 U.S. 41, 44-45 (1957); *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 199 (4th Cir. 1963).

to investigate such dispute and to certify to both parties * * * the name or names of the individual or organizations that have been designated and authorized to represent the employees * * * ."

The case of *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 323 (1943), makes it clear that the jurisdiction of the National Mediation Board is limited to disputes between rival employee representatives." The Board is limited to resolving jurisdictional disputes and settling controversies between unions as to where "the authority of one craft ends and the other begins or of the zone where they have joint authority." *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323, 334-35 (1943). The Board's jurisdiction does not extend to controversies, such as the one now under consideration, between an employee and his bargaining agent.

Since neither the Railroad Adjustment Board nor the National Mediation Board is the proper forum for this case, we hold that the District Court erred in dismissing the complaint for lack of subject-matter jurisdiction without first hearing evidence on the question of Rumbaugh's employment status. Should the District find, after examining the facts, that Rumbaugh was not a supervisor, then the action for invidious discrimination should be heard on the merits. Should it find that he was a supervisor, and therefore not within the unit represented by the union, a motion to dismiss could then properly be entertained.

See, e.g., *General Committee of Adjustment* v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943); *Flight Eng'rs Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745, 747 (2d Cir. 1963); *Division No. 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F.2d 17, 19-20 (4th Cir. 1962); *Hester* v. *Brotherhood of Railroad Trainmen*, 206 F.2d 279 (8th Cir. 1953); *Brotherhood of Railway & S.S. Clerks* v. *Atlantic C.L. R.R.*, 201 F.2d 36, 38-39 (4th Cir. 1953); *O'Donnell* v. *Pan American World Airways, Inc.*, 200 F.2d 929, 931 (2d Cir. 1953); *Rose* v. *Brotherhood of Railway & S.S. Clerks*, 181 F.2d 944, 946 (4th Cir. 1950); *Nashville, C. & St. L. Ry.* v. *Railway Employees Dep't*, 93 F.2d 340 (6th Cir. 1937); *Brotherhood of Railroad Trainmen* v. *National Mediation Board*, 88 F.2d 757 (D.C. Cir. 1936).

CLAIM AGAINST THE RAILROAD

Relying upon the established doctrine that a discharged railroad employee may at his option challenge the validity of his discharge before the Railroad Adjustment Board and seek reinstatement and back pay or, after accepting the dismissal as final, bring a civil suit against the railroad for unlawful discharge,[12] Rumbaugh further asserted in his complaint that he was electing to pursue the latter course. He also joined the union as a defendant because it wrongfully procured his discharge by the railroad.

While it is indisputable that a claim for wrongful discharge is judicially cognizable, an action of this type is essentially one at common law for breach of contract and does not arise under the Railway Labor Act. Consequently, original federal jurisdiction can attach only when there is diversity of citizenship.[13] Since, as the District Court found, there is a "patent lack of diversity between the parties," no federal jurisdiction exists over Rumbaugh's claim for wrongful discharge unless the judicially created doctrine of "pendent jurisdiction" may be invoked.

The origin of this doctrine is generally attributed to the case of *Hurn* v. *Oursler*, 289 U.S. 238 (1933). In broad terms it provides that original jurisdiction resting on the plaintiff's federal claim extends to any nonfederal claim that he may have against the same defendant provided

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[12] *Transcontinental & Western Air* v. *Koppal*, 345 U.S. 653 (1953); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Moore* v. *Illinois Cent. R.R.*, 312 U.S. 630 (1941); see, *e.g.*, *Roberts* v. *Lehigh & N. E. Ry.*, 323 F.2d 219, 223 n.5 (3d Cir. 1963); *Haley* v. *Childers*, 314 F.2d 610, 614-15 (8th Cir. 1963); *Cook* v. *Missouri Pac. R.R.*, 263 F.2d 954, 957 (5th Cir. 1959); *Cranston* v. *Baltimore & O. R.R.*, 258 F.2d 630, 631 (3d Cir. 1958); *Condol* v. *Baltimore & O. R.R.*, 198 F.2d 400 (D.C. Cir. 1952); *Cepero* v. *Pan American Airways, Inc.*, 195 F.2d 453 (1st Cir. 1952).

[13] *Duplisea* v. *Maine Cent. R.R.*, 260 F.2d 495 (1st Cir. 1958); *Stack* v. *New York Cent. R.R.*, 258 F.2d 739, 741-42 (2d Cir. 1958); *Smithey* v. *St. Louis S. Ry.*, 237 F.2d 637 (8th Cir. 1956); *Broady* v. *Illinois Cent. Ry.*, 191 F.2d 73, 78 (7th Cir.), cert. denied, 342 U.S. 897 (1951); *Bohannon* v. *Reading Co.*, 168 F. Supp. 662 (E.D. Pa. 1958); see generally Kroner, "Minor Disputes Under the Railway Labor Act," 37 N.Y.U. L. Rev. 41, 59 (1962).

that the federal question is substantial and the two claims together constitute a "single cause of action."[14] Application of the doctrine is appropriate in this case. Both the federal and the nonfederal claims are asserted by the same plaintiff against the same defendants.[15] The complaint presents one set of operative facts to support the two claims, thereby stating a "single cause of action."[16] Furthermore, it cannot be said that the federal claim is "obviously without merit," or clearly foreclosed by prior Supreme Court decisions,[17] or a matter that should be dismissed on the pleadings alone without presentation of some evidence.[18] By any of these standards of substantiality, Rumbaugh has alleged a nonfrivolous claim.[19]

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[14] See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938); *Lincoln Gas & Elec. Light Co.* v. *City of Lincoln*, 250 U.S. 256 (1919); *Siler* v. *Louisville & N. R.R.*, 213 U.S. 175 (1909); *Taussig* v. *Wellington Fund, Inc.*, 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963), noted in 49 Va. L. Rev. 1224 (1963); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 23, at 97-102 (1960); Note, 62 Colum. L. Rev. 1018 (1962); Note, 71 Harv. L. Rev 513 (1958).

[15] See *New Orleans Pub. Belt R.R.* v. *Wallace*, 173 F.2d 145 (5th Cir. 1949); *Pearce* v. *Pennsylvania R.R.*, 162 F.2d 524 (3d Cir.), *cert. denied*, 332 U.S. 765 (1947); *cf. Oliver J. Olson & Co.* v. *Marine Terminals Corp.*, 215 F. Supp. 490, 492 (N.D. Cal. 1962); *United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 191 F. Supp. 288 (E.D. Pa. 1960); Note, 62 Colum. L. Rev. 1018, 1021 (1962).

[16] *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933); see, *e.g.*, *Landstrom* v. *Thorpe*, 189 F.2d 46, 51 (8th Cir.), *cert. denied*, 342 U.S. 819 (1951); *Kleinman* v. *Petty Dain Creations, Inc.*, 189 F.2d 546, 548 (2d Cir. 1951); *French Renovating Co.* v. *Ray Renovating Co.*, 170 F.2d 945, 947 (6th Cir. 1948). The Supreme Court employed the "substantially identical" language in a reapplication of the *Hurn* doctrine. *Armstrong Paint & Varnish* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938).

[17] *E.g.*, *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105-06 (1933); *Hannis Distilling Co.* v. *Mayor*, 216 U.S. 285, 288 (1910). See also *Binderup* v. *Pathe Exch. Inc.*, 263 U.S. 291, 306 (1923); *Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 717 (1923); *Strachman* v. *Palmer*, 177 F. 2d 427, 432 (1st Cir. 1949) Magruder, J., concurring questions the "foreclosure by previous decision" aspect of the test.

[18] *E.g.*, *Robinson* v. *Stanley Home Products, Inc.*, 272 F.2d 601 (1st Cir. 1959); *Massachusetts Universelist Convention* v. *Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950); *Pure Oil Co.* v. *Puritan Oil Co.*, 127 F.2d 6 (2d Cir. 1942). See generally Comment, 46 Ill. L. Rev. 646 (1951).

[19] "Presentation of a substantial claim for purposes of the *Hurn* doctrine does not mean that it is valid on the merits. And the fact that it is subsequently found invalid on the merits does not affect the court's jurisdiction. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); Note, 49 Va. L. Rev 1224, 1228 n.9 (1963).

THE CONSPIRACY CLAIM

In addition to the independent claims against the defendants, Rumbaugh avers in his complaint that the railroad "did unlawfully join in the actions of the unions . . . and did conspire with the unions to obtain the discharge of the complainant and the damage to his property rights." Although no federal statute is cited which would authorize a district court to entertain such a common law action,[20] the doctrine of pendent jurisdiction is again appropriate for this purpose in the circumstances set up by the complaint.[21]

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[20] It does not appear that Rumbaugh in attempting to invoke the Civil Rights Act, 42 U.S.C.A. § 1985(3). *Cf. Walker v. Bank of America*, 268 F.2d 16 (9th Cir. 1959); *Schatte v. International Alliance*, 182 F. 2d 158 (9th Cir. 1950); *Lankford v. International Bhd. of Elec. Workers*, 196 F. Supp. 661 (N.D. Ala. 1960).

[21] *United Mine Workers v. Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir.), *cert. denied*, 359 U.S. 1013 (1959) (nonfederal conspiracy claim supported by federal secondary boycott claim); *Flame Coal Co. v. United Mine Workers*, 303 F.2d 39, 42 (6th Cir.), *cert. denied*, 371 U.S. 891 (1962); *United Mine Workers v. Osborne Mining Co.*, 279 F.2d 716, 724 (6th Cir.), *cert. denied*, 364 U.S. 831 (1960); *cf. Wertanen v. Wolverine Coal Co.*, 151 F. Supp. 440 (E.D. Mich. 1957).

CONCLUSION

For the above reasons we reverse the District Court's order dismissing the complaint without a hearing for lack of subject-matter jurisdiction. The alleged breach of the duty of fair representation presents a substantial claim arising under federal law, appropriately invoking the federal court's jurisdiction of the subject matter. The nonfederal claims—wrongful discharge and conspiracy—may also be entertained under the doctrine of pendent jurisdiction. Accordingly, we remand the case for further proceedings consistent with this opinion.

Reversed and remanded

Judgment

Filed and Entered, March 2, 1964.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH,
Appellant,

vs.

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA, and
UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from *the United States District Court for the* Southern *District of* West Virginia.

This cause *came on to be heard on the record from the United States District Court for the* Southern *District of* West Virginia, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Southern District of West Virginia, at Charleston, for further proceedings consistent with the opinion of the Court filed herein.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

HERBERT S. BOREMAN
United States Circuit Judge

EDWARD S. NORTHROP
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022.

LUTHER RAY RUMBAUGH,
Appellant,

versus

WINIFREDE RAILROAD COMPANY, a corporation,
THE CARBON FUEL COMPANY, a corporation,
LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA,
DISTRICT 50 UNITED MINE WORKERS OF AMERICA,
and UNITED MINE WORKERS OF AMERICA,
Appellees.

Appeal from the United States District Court for The Southern District of West Virginia, at Charleston. John A. Field, Jr., District Judge.

FILED
May 1, 1964

ON THE PETITIONS FOR REHEARING

PER CURIAM:

In their Petitions for Rehearing the appellees call attention to a factual inaccuracy in the opinion which, though legally insignificant, bears correction. According to the original complaint Rumbaugh approached an agent of the company on or about July 16, 1959, with an inquiry about his rights under the Railway Labor Act, not a "union

agent" as we recited initially. The misstatement has been corrected. That the union is the primary object of Rumbaugh's grievances appears convincingly in other portions of the complaint. The reasoning and result of our decision remain unaltered.

The core of appellees' petitions for rehearing is the Court's consideration sua sponte of the doctrine of pendent jurisdiction, which was not discussed in the briefs and oral arguments. Failure of the appellees to present this point before this time is no ground for a rehearing.

The fundamental question on the appeal is the propriety of the District Court's dismissal of the suit for lack of subject-matter jurisdiction. We concluded that there was original jurisdiction of the claim for breach of the duty of fair representation and, further, that there was ancillary jurisdiction of the remaining claims. This result is not inconsistent with the line of cases fostered by *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 737 (1824), and discussed in *Hurn* v. *Oursler*, 289 U.S. 238 (1933). It goes without saying that a court has jurisdiction to determine its own jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 292 n.57 (1947); Wright, *Federal Courts* 44-47 (1963 ed.). Furthermore, the reasons assigned by the Railroad opposing application of the doctrine of pendent jurisdiction are all dealt with in the opinion and need no further elaboration. The additional cases cited in the petition of the union are either not in point, or cumulative, or distinguishable.

As to the union's contention that under West Virginia law there can be no cause of action for conspiracy against an unincorporated labor union, we need only say that this contention, if it has merit, may be raised as an affirmative defense on remand. It does not, however, undermine the ancillary federal jurisdiction which attaches to the non-federal claim. Other defenses which the union has as yet not asserted may also be raised in the District Court. Such

defenses as lack of venue, want of legal service and failure to state a claim upon which relief can be granted, which were not considered by the District Court, we, of course, decline to pass upon.

The Petitions for Rehearing are denied.

Filed May 1, 1964

No. 9022.

Order

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston.

This Court having on March 2, 1964, rendered its decision reversing the judgment of the District Court appealed from in the above-entitled case, and the appellees having on April 1, 1964, filed petitions for rehearing en banc, and the petitions having been carefully considered,

It is now here ordered by this Court that the rehearing asked for be, and the same is hereby denied.

May 1, 1964.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9022

LUTHER RAY RUMBAUGH, *Appellant*,

v.

WINIFREDE RAILROAD COMPANY, THE CARBON FUEL COMPANY, LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA, DISTRICT 50 UNITED MINE WORKERS OF AMERICA, AND UNITED MINE WORKERS OF AMERICA, *Appellees*.

Petition of Appellees, Winifrede Railroad Company, A Corporation, and The Carbon Fuel Company, A Corporation, for A Rehearing.

Winifrede Railroad Company and The Carbon Fuel Company, two of the appellees in the above entitled cause, present this, their joint and several petition for a rehearing of this cause, and in support thereof, while reserving each position advanced in argument, respectfully represent:

At the outset your petitioners admit that some facets of the opinion of this Court are not clear to them. Petitioners, except where otherwise stated, proceed with the belief that the Court has answered the two basic jurisdictional questions posed on pages 2 and 3 of the Court's opinion as follows:

(a) There is federal court jurisdiction of Rumbaugh's claim against appellee Unions under 28 U.S.C.A. Secs. 1331, 1337, unless the District Court finds on the basis of evidence to be taken that Rumbaugh is a "supervisor," in which latter event there is not.

(b) Rumbaugh has stated no federal claim against Railroad (and presumably The Carbon Fuel Company, although Carbon is not mentioned in the Court's opinion), but under the judicially created doctrine of pendent jurisdiction the District Court has jurisdiction of the common law action for wrongful discharge asserted against Railroad and of the common law action for conspiracy alleged against Railroad and Unions, even though there is a "patent lack of diversity between the parties" (Opinion, pp. 16-19).

If these petitioners have correctly interpreted the Court's basic jurisdictional conclusions, the Court has patently erred in holding the doctrine of pendent jurisdiction applicable to Railroad. As the Court itself observes (Opinion, p. 17), the "judicially created" doctrine of pendent jurisdiction can be invoked only where the same plaintiff alleges a single cause of action constituting a substantial federal claim and a non-federal claim against "the same defendant." Since no federal claim is alleged by Rumbaugh against Railroad or Carbon, pendent jurisdiction cannot be invoked as to them.

2. The subject of "pendent jurisdiction" and the possible application of the doctrine to the common law claims asserted in Rumbaugh's complaint against Railroad and Carbon was not briefed or argued by any party to this action. For it to be applied as proposed in the Court's opinion would extend the jurisdiction of inferior federal courts to an incalculable degree. Quite aside from the merits of whether a railway employee should enjoy the privilege of "forum shopping" between the Adjustment Board, State courts and U. S. District Courts, irrespective

of diversity of citizenship, where has Congress conferred such jurisdiction on the District Courts? The Judicial Code of 1948, 28 U.S.C.A., Sec. 1338(b) legitimized the rule of *Hurn* v. *Oursler*, 289 U.S. 238, but only in the area of law (copyrights, patents, trademarks, and unfair competition) which was the subject of that decision.

The result of the application of the pendent jurisdiction doctrine in this cause could well have results in this litigation which the Court may not have considered, and which further demonstrates the inapplicability of the doctrine in this cause.

Under the law of West Virginia, Rumbaugh has no litigable right of action against any of the Union appellees. *Milam* v. *Settle*, 127 W. Va. 271, 32 S.E. 2d 269 (1944). The District Court would be bound by the rule of *Milam* v. *Settle* insofar as Rumbaugh's common law claims against Unions are concerned. *Angel* v. *Bullington*, 330 U.S. 183 (1947) reversing 150 F. 2d 679 (4th Cir.).

Thus, to apply the doctrine of pendent jurisdiction in this case will result in the District Court having jurisdiction of a purely common law action against Railroad, without diversity and without the complaint asserting a federal claim against Railroad, but the District Court will not have jurisdiction of the common law claims against Unions, the appellees against whom the Court says the complaint asserts a federal claim which in turn permits the doctrine of pendent jurisdiction to be invoked!

It cannot properly be said that the complaint asserts both a federal and a state claim against the Union appellees, or against either of these appellees. Yet it must assert one "cause of action" constituting a federal claim against each defendant as well as a state claim against each defendant for the doctrine to be applicable.

There are additional reasons why the doctrine of pendent jurisdiction cannot properly be invoked in this cause.

It cannot properly be said that the complaint of Rumbaugh presents only a "single cause of action" under the test of *Hurn* v. *Oursler*, supra and *Armstrong Paint & Varnish* v. *Nu-Enamel Corp.*, 305 U.S. 315, 325 (1938). Note, 71 Harv. L. Rev. 513 (1958). The claim against Unions here is for alleged breach of a duty of fair representation imposed by the Railway Labor Act. Rumbaugh claims that he was a non-supervisor, that Unions refused to admit him to membership, that Unions asked Railroad to discharge him, and that Unions refused to represent him after he was discharged. The claim against Railroad, on the other hand, is "essentially one at common law for breach of contract and does not arise under the Railway Labor Act." (Opinion, p. 17). Rumbaugh must only establish what the contract of employment was and that Railroad breached the contract in discharging him. It is obvious, we submit, that the facts necessary to prove Rumbaugh's claims against Unions under the Railway Labor Act will not be the same facts necessary to establish his claim against Railroad for breach of contract.

". . . if A has a cause of action against X, and there is a federal basis to support the claim, and he joins with it a cause of action against Y, and there is no federal basis for the latter claim, then it must be dismissed in the absence of diversity or alienage." Moore's Federal Practice, 2nd Edition, Vol. 3, p. 1818, and cases cited pp. 1818 and 178.

Barron and Holtzoff in Federal Practice and Procedure, Rules Edition, Vol. 1, Sec. 23, p. 100, recognize that the test propounded in *Hurn* v. *Oursler*, supra, with "its emphasis on factual identity of varying grounds for recovery," suffers from "indefiniteness" which has "created difficulties for the lower courts."

3. In addition to erroneously invoking the doctrine of "pendent jurisdiction," which was not briefed or argued by any party, and concerning which petitioners urge that

they be permitted to be heard, the Court's opinion contains other errors, some of a factual and some of a legal nature.

In summarizing the allegations of the complaint, the opinion of the Court contains a misstatement of fact on page 4. After stating, correctly, that:

"From the complaint it appears that Rumbaugh's troubles began on July 16, 1959, when a local union official, not qualified as a mechanic and without seniority, was designated to assume the responsibilities of an absent colleague."

The Court erroneously continues.

". . . the plaintiff was moved to inquire of a union agent about an individual's right under the Railway Labor Act to organize other employees, presumably into a competing bargaining unit. Dissatisfied because he was 'briskly informed' by the agent that no such right existed and displeased as well with changes being effected in rates of pay and work rules, Rumbaugh . . ."

The actual language of the complaint (Rumbaugh's original Brief and Appendix, pp. 28, 29) demonstrates the Court's error.

"5. Complainant worked in the shop with several other mechanics and on July 16, 1959 when a mechanic was off sick, another mechanic, Cooper, was next in line on seniority. Before he could take the job the defendant, Railroad and Carbon Fuel Company through its joint officer Ingra_m, did instruct one Calvert, Secretary and Treasurer of the local union to take the vacant job even though Calvert was not a mechanic, and Calvert did receive extra compensation over and above that which he had previously received. Complainant inquired of Ingrahm and Morton[1] immedi-

[1] Ingrahm and Morton were representatives of Railroad management. See last sentence, paragraph 5, Rumbaugh Complaint, page 29 of Rumbaugh's Brief and Appendix.

ately thereafter, as to the applicable rules for the operation of the shop under the Railway Labor Act and the rights of the complainant and other employees therein to organize under the Railway Labor Act; complainant was briskly informed by the officers of the railroad and Carbon above mentioned that he had no rights under the Railway Labor Act and that he should do as told by Mr. Ingrahm. At the same time rates of pay, rules and working conditions were being changed by the defendants contrary to the Railway Labor Act. Complainant went to Thomas, President of the Railroad and was assured of an investigation and hearing but the same was never given to him, all contrary to law. . . ."

The Court's error, though obviously inadvertent, lends color to the picture painted by the Court's opinion of a Rumbaugh-Union dispute, in which Railroad was only "incidentally" involved as in *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir., 1959); rather than a Rumbaugh-Railroad dispute over which the Adjustment Board would have exclusive primary jurisdiction, 45 U.S.C.A. 153, First (i).

In summarizing the complaint, the Court omitted to note that Rumbaugh expressly elected to abandon any claim he had for reemployment (Rumbaugh Brief & Appendix, p. 30). We will discuss the materiality of this omission when we discuss *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2 Cir., 1959) and such cases as *Steele*, *Howard* and *Graham*, upon which the Court relies in holding the District Court had jurisdiction of a "federal" claim against Unions and that Railroad could not complain because of its joinder as a party defendant.

4. The Court erred (Opinion, pp. 8, 9) in characterizing the case of *Priest* v. *Chicago, R.I. & P. R.R.*, 189 F. 2d 813 (8 Cir., 1951) as "a case strikingly similar to the one at hand," and in relying on it as authority for its erroneous

conclusion that evidence should be taken before ruling on the question of jurisdiction.

There was *diversity* in *Priest* and solely for that reason the Circuit Court held that the District Court erred in dismissing the complaint for lack of jurisdiction on the ground that the Adjustment Board had exclusive jurisdiction. Plaintiff contended in *Priest* that his complaint stated a common law claim for wrongful discharge and diversity jurisdiction and the Eighth Circuit agreed that his complaint was susceptible to such an interpretation.

5. We respectfully submit that the Court misinterprets Section 153 First (i) of 45 U.S.C.A. (the Railway Labor Act) and the rationale of *Steele*, *Howard*, *Graham* and other cases cited, in holding that since Rumbaugh had a *joint* dispute with Railroad and Unions involving only the interpretation of a collective bargaining agreement, the Railway Adjustment Board did not have jurisdiction. The cases cited do not support this conclusion. If the Railroad is only a bystander, not actually involved in the dispute, or the proper interpretation and application of the collective bargaining agreement is not material in disposing of the dispute, *Steele*, *Howard*, *Graham*, *Conley* v. *Gibson*, *Cunningham* v. *Erie R.R.*, and the other cases cited might have relevancy. But where the sole issue involves the proper interpretation and application of a collective bargaining agreement, and the dispute is with Railroad and Unions about this single issue, and determination of the dispute with Railroad will determine the dispute with the Unions, the exclusive jurisdiction of the Board is not controverted by the rationale of any of the cases cited.

We reiterate our belief that this Court held that as to appellee Railroad, Rumbaugh's complaint stated no federal claim, or put another way, the Court held that the Adjustment Board had exclusive primary jurisdiction of Rumbaugh's dispute with Railroad about whether or not he was a supervisor and thus excluded from the collective

bargaining agreement. Such a conclusion seems inescapable from the language of the Court's opinion.

6. Appellees are perplexed by that part of the Court's opinion (pp. 12-14) relating to joinder of Railroad in Rumbaugh's federal claim against Unions. We do not believe the Court holds there is a federal claim against Railroad, as we have heretofore stated. The Court speaks in terms of federal jurisdiction (of the claim against Unions) not being "destroyed" by joinder of railroads in *Steele, Howard* and *Graham*, and erroneously cites *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (2nd Cir., 1959) as authority for joining Railroad.

Steele, Howard and *Graham* involved the validity of collective bargaining agreements, not their interpretation. *Brotherhood of R. T.* v. *Howard*, 343 U.S. 768, 774, summarizes the scope of those cases:

> "Here, as in the Steele Case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board. The claims here cannot be resolved by interpretation of a bargaining agreement so as to give jurisdiction to the Adjustment Board under our holding in Slocum v. Delaware, L. & W.R. Co. 339 US 239, 94 L ed 795, 70 S Ct 577. *This dispute involved the validity of the contract,* not its *meaning*. Nor does the dispute hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in Switchmen's Union of N. A. v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S Ct 95. . . ." (Emphasis added)

Jurisdiction of defendant railroads in *Steele, Howard* and *Graham* existed, if at all as ancillary equity jurisdic-

tion to prevent obliteration of employee's rights, on the theory that the employee had no administrative remedy. Here the Adjustment Board clearly had jurisdiction of Rumbaugh's dispute with Railroad and interpretation of the agreement by the Board would have resolved, incidentally, the dispute with the Unions.

Cunningham v. *Erie R.R.*, 266 F. 2d 411, was erroneously relied on (Opinion, pp. 12, 13) to support Rumbaugh's joinder of Railroad in his "federal claim" against Unions. The *Cunningham* case is not in point, because as Judge Medina there observed (266 F. 2d 415):

> "This dispute based on alleged discrimination is between the employee and the union not between either an employee or a union and the railroad; the railroad is brought in only because it claimed it was required by law to discharge persons who had been removed as members of the union for non-payment of dues."

And at page 416:

> ". . . what Cunningham is doing in this action is questioning the *validity* of the collective bargaining agreement as applied to the circumstances of his dismissal, rather than the '*interpretation or application*' of the agreement." (Emphasis by the Court)

Further, in *Cunningham* Judge Medina apparently thought it important to buttress his decision that there was jurisdiction of railroad by saying (266 F. 2d 416):

> "While the complaint prays for relief by way of damages and does not in terms ask for Cunningham's reinstatement by the railroad, his claim was treated at the trial as one in the alternative for reinstatement and there was considerable discussion of the point on the oral argument before us, without objection. Moreover, the railroad has asserted in its amended answer a claim for indemnity against the union . . ."

In the later case of *Latham* v. *Baltimore & Ohio Railroad Company*, 274 F. 2d 507, 511, 512, Judge Medina described *Cunningham* as a case in which exclusive jurisdiction had not been conferred on the Adjustment Board because Cunningham was questioning the "*validity*" of the collective bargaining agreement, not its "*interpretation*" (p. 511). At page 512 of *Latham*, Judge Medina said of *Cunningham*: "The railroad was made a party because Cunningham prayed for reinstatement."

There is no similarity between Railroad's position in this case and the position of the Erie in *Cunningham*:

(1) There the validity of the contract was in dispute. Here the dispute is about interpretation and application of the contract.

(2) There the dispute was between the employee and his union and not between the employee and the railroad. Here the dispute is between the employee and the union *and* between the employee and the railroad, and both disputes relate to the proper interpretation and application of the contract.

(3) There Cunningham sought reinstatement in employment. Here Rumbaugh has expressly renounced any claim to reinstatement in employment.

7. If, as your petitioners contend, the Federal District Court lacked jurisdiction of Rumbaugh's claim against Railroad and Carbon, Rule 20(a) of the Federal Rules of Civil Procedure has no application because it is basic, reaffirmed in Rule 82, that the Rules of Civil Procedure cannot extend the Court's jurisdiction.

8. The Court acknowledges that the action of the District Court in dismissing this action against all defendants for lack of jurisdiction was "consistent with the position theretofore taken by this Court," but says "it does not reflect the broader principle which we subsequently announced in *Thompson* v. *Brotherhood of Sleeping Car Porters*, 316 F. 2d 191 (4th Cir. 1963)". Opinion, pp. 5, 6. We respectfully submit that *Thompson*, which involved only an employee-union controversy which in turn involved "only incidentally a consideration of the collective bargaining agreements and Thompson's seniority rights" (316 F. 2d 191, 199), is not determinative of this case. *Thompson* actually left most of the legal principles announced by Judges Parker, Soper and Dobie in *Alabaugh* v. *Baltimore and Ohio Railroad Company*, less than nine years ago, 222 F. 2d 861 (1955), unimpaired and determinative of this case unless *Alabaugh* is to be completely overruled. We respectfully submit that decisions of this Circuit should not be overruled except by action of the court in banc, particularly when, as in the situation here, no subsequent decision of the U. S. Supreme Court since *Alabaugh* requires reversal. This is the practice in at least one other circuit. See *Upton* v. *C. I. R.* 283 F. 2d 716, 723 (9th Cir. 1960).

The decision of this court in Rumbaugh can only bring about the result anticipated by Judge Parker, when he said (222 F. 2d 861, 866):

> "* * * it would breed endless confusion and virtually nullify the administrative remedy which Congress has been at pains to provide, to allow the Board to be by-passed by an allegation that rights under a statute are involved."

9. Because of the errors assigned and the importance of the issues presented in this case, and particularly since the applicability of the doctrine of pendent jurisdiction was not briefed or argued by any party in this cause, a re-

hearing of this case on its merits before the Court in banc is requested.

Respectfully submitted,

F. PAUL CHAMBERS
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Counsel

March 26, 1964

I hereby certify that the foregoing petition is, in my opinion, well founded and that it is presented in good faith and not for delay.

F. PAUL CHAMBERS
Of Counsel for
WINIFREDE RAILROAD COMPANY and
THE CARBON FUEL COMPANY,
Appellees.

APPENDIX E

RAILWAY LABOR ACT

45 USCA

"§151. DEFINITIONS

"When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this chapter.

"Third. The term 'Mediation Board' means the National Mediation Board created by this chapter.

"Fourth. The term 'commerce' means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

"Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation desig

nated either by a carrier or group of carriers or by its or their employees, to act for it or them.

"Seventh. The term 'district court' includes the United States District Court for the District of Columbia; and the term 'court of appeals' includes the United States Court of Appeals for the District of Columbia.

"This chapter may be cited as the 'Railway Labor Act.' May 20, 1926, c. 347, § 1, 44 Stat. 577; June 7, 1934, c. 426, 48 Stat. 926; June 21, 1934, c. 691, § 1, 48 Stat. 1185; June 25, 1936, c. 804, 49 Stat. 1921; Aug. 13, 1940, c. 664, §§ 2, 3, 54 Stat. 785, 786; June 25, 1948, c. 646, § 32(a), (b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107."

"§151a. General purposes

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186."

"§ 152. General duties—Duty of carriers and employees to settle disputes

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere

in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly desig

nated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

Union security agreements; check-off.

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of

the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

§ 153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.